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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 IN RE MORNING SONG BIRD FOOD
12 LITIGATION,

Lead Case No.: 12cv01592 JAH - AGS

13 **ORDER DENYING SCOTTS**
14 **DEFENDANTS' MOTION TO**
15 **DISMISS AND DENYING**
16 **DEFENDANT HAGEDORN'S**
17 **MOTION FOR**
RECONSIDERATION
[Doc. Nos. 344, 345]

18 Pending before the Court is Defendants The Scotts Miracle-Gro Company ("SMG")
19 and The Scotts Company LLC's ("Scotts LLC") (collectively "Scotts Defendants") motion
20 to dismiss or, in the alternative, motion for partial judgment on the pleadings and Defendant
21 James Hagedorn's motion for reconsideration, or in the alternative, motion for judgment
22 on the pleadings. The motions are fully briefed by the parties. Upon review of the parties'
23 submissions, and for the reasons discussed below, the Court DENIES the Scotts
24 Defendants' motion and DENIES Defendant Hagedorn's motion.

25 **I. Scotts Defendants' Motion**

26 The Scotts Defendants move to dismiss the out-of-state Plaintiffs' and class
27 member's claims, including Counts V-VII and IX in their entirety and Counts I, VII, X and
28 XI in part for lack of personal jurisdiction based upon the holding in Bristol-Myers Squibb

1 Co. v. Superior Court of California, 137 S.Ct 1773 (2017). They further seek an order
2 limiting any further proceedings to the California Plaintiffs and appropriate class members.

3 In opposition, Plaintiffs argue Defendants have waived any challenge to personal
4 jurisdiction, and, even assuming there is no waiver, Bristol-Myers is not applicable.

5 Defendants maintain their motion is procedurally proper because Federal Rule of
6 Civil Procedure 12(g)(2) permits a defendant to file a second motion to dismiss when it
7 raises a defense or objection that was not available to the party at the time its earlier motion
8 to dismiss was made. Defendants contend an intervening change in Supreme Court
9 jurisprudence made a new personal jurisdiction defense available that was unavailable at
10 the time they filed their first Rule 12 motion. They maintain Bristol-Myers significantly
11 restricts the circumstances under which specific personal jurisdiction may be exercised by
12 this Court over the Scotts Defendants with respect to the out-of-state Plaintiffs' claims with
13 insufficient connections to California.

14 Plaintiffs argue Defendants waived any personal jurisdiction challenge when they
15 failed to assert such a defense in their Rule 12 motion filed at the outset of the case.
16 Plaintiffs contend Defendants had at least five different opportunities in the past five years
17 to challenge this Court's jurisdiction but did not. They argue, by appearing before this
18 Court for the past five years and filing numerous motions seeking this Court's protection
19 and adjudication of Plaintiffs' claims on the merits, Defendants have either waived or
20 should be estopped from now raising any challenge to this Court's exercise of personal
21 jurisdiction over them.

22 Additionally, Plaintiffs argue Bristol-Myers does not constitute an intervening
23 change in controlling law. They maintain the Court in Bristol-Myers expressly stated that
24 it was not changing the law. Further, they contend Defendants fail to identify any relevant
25 binding Ninth Circuit or Supreme Court precedent that foreclosed the personal jurisdiction
26 challenge they now say is purportedly available under Bristol-Myers. Plaintiffs maintain
27 it is not enough for Defendants to say they believed any such challenge would have been
28 futile because Defendants know how to preserve an issue.

1 In reply, Defendants maintain Bristol-Myers changed the reach of California’s long-
2 arm statute by rejecting the “sliding scale” methodology for personal jurisdiction and
3 abrogated pendent personal jurisdiction. They contend they “promptly” filed this motion
4 after the Bristol-Myers decision was published.

5 A party waives the defense of lack of personal jurisdiction if it omits it from a
6 previous motion filed under Rule 12 or fails to raise the issue in its responsive pleading.
7 FED.R.CIV.P. 12(h); see also Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986). There is
8 no dispute the Scotts Defendants did not raise lack of personal jurisdiction in their initial
9 motion to dismiss. Defendants, however, claim Bristol-Myers is an intervening change in
10 controlling law permitting them to raise the issue for the first time in the pending motion.
11 Bristol-Myers involved a mass tort action with over 600 individual plaintiffs, most of
12 whom were not residents of California, seeking relief under state law for injuries allegedly
13 caused by the drug Plavix. 137 S.Ct at 1777. The Court analyzed the assertion of
14 jurisdiction by the state court and its compatibility with the due process clause of the
15 Fourteenth Amendment, and determined California courts did not have specific jurisdiction
16 to entertain the nonresident plaintiffs’ claims.

17 This Court finds Bristol-Myers is not an intervening change in controlling law. In
18 reaching its decision, the Court explicitly stated “settled principles regarding specific
19 jurisdiction control[led] the case” and further described its holding as a “straightforward
20 application” of those settled principles. 137 S.Ct at 1781, 1783. The Court noted the
21 California court’s use of a sliding scale was not supported by precedent, including the
22 Supreme Court’s decision in Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S.
23 915 (2011), which required a connection between the forum and underlying controversy to
24 support specific jurisdiction. Id. at 1781. Contrary to Defendants’ assertion, the Court did
25 not change personal jurisdiction jurisprudence but applied “settled principles” in reaching
26 its decision.

27 Furthermore, Defendants were not prevented from asserting lack of jurisdiction as
28 to the named nonresident Plaintiffs prior to the ruling in Bristol-Myers. See Abrams Shell

1 v. Shell Oil Co., 165 F.Supp.2d 1096, 1107 n.5 (C.D.Cal. 2001) (“Notwithstanding the
2 relaxation of venue and personal jurisdiction requirements as to unnamed members of a
3 plaintiff class, it is by now well settled that these requirements to suit must be satisfied for
4 each and every named plaintiff for the suit to go forward.”). Therefore, the defense was
5 available to them at the time they filed their original motion.

6 Accordingly, Defendants have waived a personal jurisdiction challenge by failing to
7 raise the issue in their initial motion to dismiss. Bristol-Myers does not afford Defendants
8 any new relief under specific jurisdiction jurisprudence. Defendants’ motion to dismiss, or
9 in the alternative, motion for a judgment on the pleadings is DENIED.

10 **II. Defendant Hagedorn’s Motion**

11 Defendant Hagedorn seeks an order reconsidering the Court’s denial of his motion
12 to dismiss for lack of personal jurisdiction in light of the Supreme Court’s ruling in Bristol-
13 Myers. In the alternative, he seeks dismissal of claims brought by non-California Residents
14 who do not allege their injuries occurred in California.

15 In opposition, Plaintiffs argue Bristol-Myers is not an intervening change in
16 controlling law warranting reconsideration of the Court’s prior order denying Defendant
17 Hagedorn’s motion to dismiss for lack of jurisdiction. They further argue Defendant is not
18 entitled to judgment on the pleadings because Bristol-Myers is inapplicable.

19 **A. Motion for Reconsideration**

20 Defendant seek reconsideration of the Court’s previous order denying his motion to
21 dismiss for lack of personal jurisdiction pursuant to Rule 54(b). Under Rule 54(b), district
22 courts have the inherent authority to reconsider interlocutory rulings at their discretion until
23 a final judgment is entered. A number of judicial doctrines have evolved to guide courts
24 when reviewing issued interlocutory orders. The “law of the case” doctrine, as well as
25 public policy, dictates that the efficient operation of the judicial system requires the
26 avoidance of re-arguing questions that have already been decided. See Pyramid Lake
27 Paiute Tribe of Indians v. Hodel, 882 F.2d 364, 369 n.5 (9th Cir. 1989). Most courts, thus,
28 adhere to a fairly narrow standard by which to reconsider their interlocutory opinions and

orders. This standard requires that the party show: (1) an intervening change in the law; (2) additional evidence that was not previously available; or (3) that the prior decision was based on clear error or would work manifest injustice. Paute Tribe, 882 F.2d at 369 n.5.

This district's Local Rules require a motion for reconsideration "be filed within twenty-eight (28) days after the entry of the ruling, order or judgment sought to be reconsidered." CivLR 7.1.i.2. Defendant recognizes he filed his motion beyond the deadline, however, he contends it was filed within 28 days of the decision in Bristol-Myers, which he argues is an intervening change in controlling law. He further asserts this purported change in the controlling law requires reversal of the Court's prior decision. As discussed above, the Court finds Bristol-Myers is not an intervening change in controlling law. As such, Defendant's motion for reconsideration is untimely.

Additionally, Defendant does not assert the existence of additional evidence not previously available, and as discussed below, Defendant fails to demonstrate the prior decision was based on clear error or is necessary to prevent manifest injustice. Accordingly, the motion for reconsideration is DENIED.

B. Judgment on the Pleadings

In the alternative, Defendant seeks judgment on the pleadings for lack of personal jurisdiction. Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial." FED.R.CIV.P. 12(c). Judgment on the pleadings is proper only when there is no unresolved issue of fact and no question remains that the moving party is entitled to a judgment as a matter of law. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir. 1989); Honey v. Distelrath, 195 F.3d 531, 532-33 (9th Cir. 1999). The standard applied on a Rule 12(c) motion is essentially the same as that applied on Rule 12(b)(6) motions. See Hal Roach Studios, Inc., 896 F.2d at 1550. Thus, the allegations of the non-moving party are accepted as true, and all inferences reasonably drawn from those facts must be construed in favor of the responding party. Id.

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2 Defendant contends the decision in Bristol-Myers requires the claims against him be
3 dismissed for lack of personal jurisdiction because it clarified that a state's long arm statute
4 cannot confer specific personal jurisdiction over a non-resident defendant with respect to
5 claims brought by non-resident plaintiffs, where the defendant's relevant conduct did not
6 occur in the subject forum and the non-resident plaintiffs did not suffer harm in the subject
7 forum. He maintains this Court relied on his alleged involvement during an October 2007
8 meeting, which took place in Ohio in determining personal jurisdiction in the previous
9 motion and Bristol-Myers demonstrates the Court's analysis was mistaken. He maintains
10 absent a showing that non-California Plaintiffs suffered injury or economic loss arising
11 from his conduct in California, this Court cannot exercise specific personal jurisdiction
12 over him with regard to the non-resident Plaintiffs' claims and with regard to non-resident
13 class member claims.

14 Additionally, Defendant argues this Court has no specific personal jurisdiction over
15 him with respect to claims brought by California residents. He contends the Court engaged
16 in the sliding scale approach rejected by Bristol-Myers in reaching its prior decision.

17 In opposition, Plaintiffs maintain it is the law in the Ninth Circuit that there must be
18 a "but for" link between the claims and the forum and this Court explicitly found Defendant
19 purposefully directed his conduct towards California and that the claims result from
20 Defendant's forum-related activities. Thus, they argue, this Court carefully considered the
21 relevant law and arguments before rejecting Defendant's prior jurisdictional challenge.
22 They maintain Defendant's current motion seeks to rehash his personal jurisdiction
23 arguments that this Court previously considered and rejected.

24 Plaintiffs contend, even assuming Bristol-Myers changed the law, it is not applicable
25 here. They maintain while Bristol-Myers involved an appeal from a non-class action case
26 brought on behalf of mostly non-residents in a California state court for state law claims
27 only, here, the parties are in federal court and litigating a nationwide federal Racketeer
28 Influenced and Corrupt Organizations Act ("RICO") class claim. They further maintain

1 the Supreme Court specifically left open the question of whether the Fifth Amendment
2 imposes the same restrictions on the exercise of personal jurisdiction by a federal court.
3 Plaintiffs argue, under its express limitation to state court cases, Bristol-Myers has no
4 application to this federal court case. Additionally, Plaintiffs contend Bristol-Myers has
5 no bearing on the RICO class claim. They maintain Defendant tries to bootstrap Bristol-
6 Myers to argue the Court lacks personal jurisdiction as to claims by non-named class
7 members who are not residents of California, but, they argue, this is not supported by
8 Bristol-Myers or prior jurisprudence which determined that federal court jurisdiction does
9 not query the residence of unnamed class members in class actions.

10 Plaintiffs maintain the only claim pending against Defendant Hagedorn is a federal
11 RICO class claim brought by California class representatives, Laura and Milt Cyphert, and
12 the Second Amended Consolidated Complaint alleges, among other things, the Cypherts
13 purchased their SMG Wild Bird Food products in this District. They contend this Court
14 found Plaintiffs allege Defendant was specifically informed of the illegal pesticide use in
15 October 16, 2007, and continued to make and sell millions of bags of the bird food in this
16 district and elsewhere, as a result of Defendants' illegal scheme and conspiracy. Plaintiffs
17 and the class purchased a product that contained bird poison in this district and throughout
18 California. Plaintiffs argue, under these facts and circumstances, Defendants' (including
19 Defendant Hagedorn's) California-related conduct, including Defendant Hagedorn's, gave
20 rise to the Cypherts' RICO class claim. Accordingly, they argue, this Court may exercise
21 personal jurisdiction over Hagedorn with respect to the RICO class claim.

22 In reply, Defendant argues Plaintiffs have never identified any activity by Defendant
23 Hagedorn that occurred in California, from which any of Plaintiffs' claims arose.
24 Defendant contends due process under the Fourteenth Amendment is at issue here because
25 the only potential basis for personal jurisdiction is the California long arm statute, which
26 is limited by the Fourteenth Amendment. As such, he argues this case falls squarely within
27 the confines of Bristol-Myers' ruling regarding due process under the Fourteenth
28 Amendment, and does not implicate the "open question" regarding Fifth Amendment due

1 process. Even if the Fifth Amendment was at issue here, he maintains, the Ninth Circuit
2 has explicitly treated the due process analysis for personal jurisdiction under the Fifth
3 Amendment and the Fourteenth Amendment the same. Defendant further maintains
4 Plaintiffs' contention that Bristol-Myers is inapplicable to class members' claims is
5 meritless.

6 In its order granting in part and denying in part Defendant Hagedorn's motion to
7 dismiss for lack of personal jurisdiction and failure to state a claim, this Court granted the
8 motion as to the state law claims for failure to state a claim and denied the motion as to the
9 RICO claim. Considering Plaintiffs' allegations of Defendant's direct involvement in the
10 illegal wild bird food enterprise, including his involvement in wild bird food sales and
11 marketing strategies directed to California, and periodic updates to investors during the
12 class period, the Court found the allegations demonstrate he was a participant in the alleged
13 wrongdoing and purposefully directed his conduct toward California. The Court further
14 found the claims resulted from his forum-related activities and the exercise of jurisdiction
15 was reasonable. Defendant suggests this Court utilized the "sliding scale approach" the
16 majority in Bristol Myers, found "difficult to square with [its] precedents." Bristol-Myers,
17 137 S.Ct at 1781. According to the Bristol-Myers Court, the "sliding scale approach"
18 involved relaxing "the strength of the requisite connection between the forum and the
19 specific claims at issue" if the defendant has other extensive contacts with the forum
20 unrelated to the claim. Id. This Court specifically found the claims resulted from
21 Defendant's alleged wrongful forum-related activities.

22 Additionally, the Court finds Bristol-Myers is inapplicable to this case. Bristol-
23 Myers involved a state court's exercise of personal jurisdiction over a non-resident
24 defendant as to non-resident named plaintiffs in a mass tort case. The Court in Bristol-
25 Myers, specifically limited its ruling to the exercise of jurisdiction by a state court and left
26 open the question of whether "the Fifth Amendment imposes the same restrictions on the
27 exercise of personal jurisdiction by a federal court." Id. at 1784. Defendant argues the
28 specific jurisdiction analysis here implicates Fourteenth Amendment due process because

1 the Court must look to California's long-arm statute. California's law arm statute permits
2 the exercise of jurisdiction within limits set by federal due process. Daimler AG v.
3 Bauman, 571 U.S. 117, 134 S.Ct 746, 753 (2014). "[T]he jurisdictional analyses under
4 California state law and federal due process are the same." Axiom Foods, Inc. v. Acerchem
5 International, Inc., 874 F.3d 1064, 1068 (9th Cir. 2017) (quoting Mavrix Photo, Inc. v.
6 Brand Techs., Inc., 647 F.3d 1218, 1223 (9th Cir. 2011). Bristol-Myers is arguably
7 instructive to federal courts evaluating the exercise of personal jurisdiction under
8 California law.

9 Nevertheless, the Court finds Bristol-Myers inapplicable to this suit which involves
10 a class action. Bristol-Myers was a mass tort action and it determined the court's exercise
11 of jurisdiction to hear claims by named non-resident plaintiffs. While the claims of the
12 non-resident named plaintiffs were pertinent to the issue of specific jurisdiction in Bristol-
13 Myers, "claims of unnamed class members are irrelevant to the question of specific
14 jurisdiction." AM Trust v. UBS AG, 78 F.Supp.3d 977, 986 (N.D.Cal. 2015).
15 Furthermore, Justice Sotomayor notes, in her dissent, that the majority left open the
16 question of the decision's applicability to class actions. 137 S.Ct. at 1789 n.4 ("The Court
17 today does not confront the question whether its opinion here would also apply to a class
18 action in which a plaintiff injured in the forum State seeks to represent a nationwide class
19 of plaintiffs, not all of whom were injured there."). This Court declines to extend the
20 holding of Bristol-Myers to this case involving a class action.

21 Therefore, the Court finds Defendant is not entitled to judgment on the pleadings
22 and this motion is DENIED.

23 CONCLUSION AND ORDER

24 Based on the foregoing, IT IS HEREBY ORDERED:

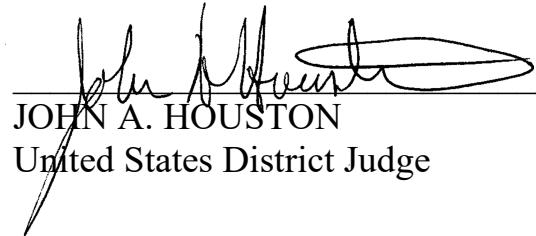
25 1. The Scotts Defendant's motion to dismiss or, in the alternative, motion for
26 partial judgment on the pleadings (Doc. No. 344) is DENIED;

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1 2. Defendant Hagedorn's motion for reconsideration or, in the alternative,
2 motion for judgment on the pleadings (Doc. No. 345) is DENIED.

3 DATED: March 19, 2018

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6 JOHN A. HOUSTON
7 United States District Judge
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